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IN THE
Supreme Court of the United States
October Term, 1978
No. 78-837

DANIEL FATICO, NICHOLAS COROZZO, LEONARD DE MARIA, KENNETH REESE, JAMES DELLARATTA and LOUIS SCIDA,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petitioners respectfully request that a Writ of Certiorari issue to review the judgment Order, entered on October 24, 1978, by the United States Court of Appeals for the Second Circuit in this proceeding.

JURISDICTION

The judgments of conviction were entered against the petitioner De Maria and the co-petitioners on June 9, 1978. The judgments were affirmed on appeal to the

United States Court of Appeals for the Second Circuit by order entered October 24, 1978.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Should the Government have been directed to disclose the name of an undercover FBI agent, notwithstanding that said disclosure may have been tantamount to disclosure of a confidential informant, where said agent could confirm or deny the defendant's allegation at trial that critical testimony of another agent was perjured?

2. Under the facts of this case was the trial Courts failure to submit a missing witness charge upon defense counsel's request an abuse of discretion?

STATEMENT OF THE CASE

The petitioners were indicted and tried in the Eastern District of New York. Count One (1) of the indictment charged all defendants with unlawfully conducting an illegal gambling business involving five or more persons in its operation from on or about and between September 1, 1975 and December 12, 1975 in violation of Title 18, USC Sections 1955 and 2. Count Two of the indictment charged all defendants during the same period of time with conspiracy to violate Section 1955 in violation of Title 18, USC Section 371.

At the conclusion of the trial, all defendants were acquitted of the conspiracy count and convicted solely of violation of Sections 1955 and 2. On appeal, the Second Circuit affirmed the petitioners' convictions.

The Government's witnesses at trial were Special

Agents, Paul Brana, Richard Nalley, George D. Dyer, A. Robert Walsh, Thomas R. French, Joseph Daly and Richard T. Lind. Agent Lind testified as the Government's gambling expert. Agents Daly, French and Walsh testified to the circumstances surrounding the execution of a search warrant on December 12, 1975 for the premises 5002 Church Avenue and various named defendants. Agent Dyer testified to street surveillances of the premises on November 6th, 7th and December 8th, 9th, 10th, 1975 and to the execution of the warrant on December 12, 1975. Agent Nalley testified to street surveillances on September 17th, 18th, 19th, 25th, 26th, October 2nd, 3rd, 6th, 7th, 15th, 16th, 17th, 23rd and 24th, 1975. Agent Brana testified to various acts and statements made by the defendants within premises 5002 Church Avenue on September 252th, October 6th, 15th, 16th, 23rd and November 6, 1975. The following testimony was elicited by the above witnesses.

Special Agent Brana testified that on the above noted dates he appeared at the premises 5002 Church Avenue and participated in a crap game (34)[1] on each date. He arrived at about 11 to 11:45 P.M., and stayed approximately 1 hour 45 minutes to 2 hours and 15 minutes (35).

Brana testified that on each of the six (6) nights he participated in the game, he observed one or more of the defendants named in the indictment act as either a dealer

1. Numbers in parentheses refer to trial transcript. Premises 5002 Church Avenue was described as a two story brick structure having a street level entrance leading to stairs to the second floor where there are several doors, the last of which opened to a large room divided into two (2) rooms, one having a TV and chairs, the other containing a crap table, 3½ feet by 12 feet, covered with green felt. The premises is also known as the Churchonian Social Club. (35, 36, 37, 40, 200).

or stickman (49-52),[2] but never received chips from any of the defendants (114-119).

Although Brana testified that he never saw any of the defendants participate in the game as a player or gambler, he indicated he left prior to the end of the game. Moreover, he testified that a bet could be placed without touching the dice or putting money on the table and that he did not know whether any one of the six (6) defendants were making side bets on the night he was present (54, 77-80, 114).

On cross examination, defense counsel was precluded from inquiring of Brana who took him into the crap game. At that time both the Court and defense counsel were mislead by Agent Brana and the Government into believing that it was a confidential informant that allegedly introduced him into the game and disclosure of same would jeopardize his position (70-71).

Subsequent thereto, a recess was called at which time defense counsel informed the Court that it was their position that Brana's testimony was perjured and that infact he was never inside the premises 5002 Church Avenue on the dates he claimed. (125-127) Indeed, no where in the reports of any agent was there mention of a confidential informant entering with the agent and Assistant U.S. Attorney McCallion so stipulated (127-130, 143, 144, 196-197), nor were there any photographs of Brana or the informant entering. (172-173, 183)

At this time, Assistant U.S. Attorney Thomas Puccio (Chief of the Strike Force), who was otherwise not involved in the trial, appeared before Judge Weinstein and apparently after conversing with Agent Brana, informed the Court and defense counsel for the first time that it was not

2. A dealer is one who pays and collects the bets on the table, while a stick man is one who retrieves the dice with a stick and moves them from player to player. (45, 49).

a confidential informant that allegedly introduced Brana into the game, but rather another FBI Agent. (130-133). At this time the Court again called for the Government to supply it with information to be reviewed in camera.

Subsequent testimony established that on December 12, 1975, a search warrant was executed for premises 5002 Church Avenue and several named defendants. As a result of said search, a brown felt pad was recovered and lost, money taken from the defendants and several other items of evidence seized. (155-160) Agent Dyer searched the defendant DeMaria and found only a small amount of money on his person. (186, 196)

At the conclusion of the entire case, counsel moved for a dismissal for the Government's failure to disclose the agent. At said time defense counsel reiterated its position that Brana's testimony was perjured and in support of same referred the Court to the sworn affidavit of December 11, 1975 by Agent Nally in support of the December 12, 1975 search warrant, wherein there were extensive recitals of two confidential informants, but not one word of any undercover FBI Agents entering the premises. (276, see affidavit A-6)[3] The Court again ordered the Government to produce information for an in camera inspection. Counsel also requested that the Court charge that the witness in the Government's control and not produced would testify adversely. (272, 275-278) Both were denied by the Court.

Thereafter, the jury acquitted all defendants of the conspiracy charge. (390-394) Defendants motion to dismiss the substantive count on double jeopardy grounds was denied and the jury after further deliberation, convicted all defendants of the gambling count.

3. Numbers in parentheses preceded by the letter "A" refer to appendix to the Court of Appeals.

Subsequent to conviction, appellants moved pursuant to Rule 29 to set aside the conviction based upon Agent Brana's testimony at trial. Said motion was denied.

REASONS FOR GRANTING WRIT

1. THE DISTRICT COURT'S RULING AS AFFIRMED BY THE SECOND CIRCUIT COURT OF APPEALS REGARDING THE NON-DISCLOSURE OF AN UNDERCOVER FBI AGENT IS IN DIRECT CONFLICT WITH THIS COURT'S DECISIONS REGARDING THE DISCLOSURE OF WITNESSES.

It was the petitioners' contention at trial and thereafter in the Court of Appeals that their conviction was based upon the perjured testimony of Agent Paul Brana.

As mandated by the Sixth Amendment to the United States Constitution,

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . . "

Notwithstanding the above, this Court has held in *Roviaro v. United States,* 353 U.S. 53 (1957) and its related case law that the Government has a privilege of refusing to disclose the identity of its informants at trial.

However, this privilege is qualified and where the disclosure of an informer's identity . . . is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. *Roviaro,* supra page 60-61.

As noted in *Roviaro,* each case must be considered on its own merits, giving consideration to the crime charged, possible defenses, possible significance of the informers testimony and other relevant factors. *Roviaro* page 62. The petitioners contend that a conviction that could be and indeed was based upon perjured testimony is a relevant factor in determining disclosure and should be sufficient in and of itself to mandate said disclosure.

Notwithstanding the above, the District Court and The Court of Appeals made no finding with respect to the significance of the undisclosed agent's testimony, but was only concerned with potential harm to the confidential informant. Moreover as reflected by the opinion of the Court of Appeals, there was no finding that Brana's testimony was not perjured but rather that there was no justification for disclosure since the defendants could have called other witnesses to show Brana perjured himself.

Obviously, even if other witnesses were available to the petitioners, this cannot rectify the fact that the convictions were based upon perjured testimony.

This fact is clearly established in several ways:

1. The affidavit of Agent Richard A. Nalley made in support of the issuance of the search warrants herein and dated December 11, 1975 sets forth the fact that the information he received was from Agent Robert Walsh and Joseph Keating and from two confidential informants, one of whom gave information in ten other gambling investigations and the other one who is alleged to have been a gambler. At no point in this affidavit is there even an inkling that two undercover FBI Agents were involved. (A-6 to A-19, A80)

2. It was established at trial that there are no records in the possession of the FBI of monies given to Agent Brana for betting purposes and the testimony on Brana's winnings and/or losses was grossly inconsistent with the

testimony of the supervising agent, Nalley. This Court is well aware that in all instances the bookkeeping procedures of the FBI are flawless and had there been any monies given or received from Agent Brana through Agent Nalley, there would have been records to that effect, (A25-28, A35, A38-39, A45-50, A67-69, A74).

3. For "security reasons" there is not even one mention in the surveillance log of any Agent other than Brana's own records of his entering or leaving the social club. Not even an "u/c in" or a "u/c out" without mentioning any name. When before, even in narcotics or murder cases, has the Court been given such an excuse. (A60, A70-A71).

4. During the course of the trial it was revealed that numerous photographs were taken including the days when Agent Brana is alleged to have entered and left the social club yet there is not even one picture of Brana entering or leaving. (A70-A71, A72)

5. Agent Brana testified the color of the dice table was green (which is usually the color of dice tables) when in fact in this case the table was brown and is not available because same was "lost" by the FBI. (A20-A23, A61-A66)

6. Agent Brana's self-contradictory testimony with respect to the manner in which he allegedly gained entry into the premises, passing the alleged security guard at the entrance. (A40-A41)

7. Agent Brana's self-contradictory testimony with respect to whether the defendant DeMaria or any defendant gave him chips on any of the nights he was allegedly at the game. Brana first testified that the defendant De Maria paid him in chips and shortly thereafter denied that any defendant gave him chips. (A43-A48)

Although appellants are not privy to the sealed documentation submitted to Judge Weinstein, the Court of Appeals and presumably this Court, even if said documentation should establish the existence of the undercover FBI Agent, it cannot erase the fact that appellants' conviction was based on perjured testimony.

It is respectfully submitted that for this reason, disclosure was essential to a fair determination of petitioners' guilt on innocence as set forth in *Roviaro* and both the District Court and Second Circuits rulings were in direct conflict therewith.

2. THE TRIAL COURT'S FAILURE TO SUBMIT A MISSING WITNESS CHARGE AS AFFIRMED BY THE COURT OF APPEALS IS IN DIRECT CONFLICT WITH THIS COURT'S DECISIONS REGARDING FAILURE TO PRODUCE WITNESSES EXCLUSIVELY WITHIN ONE PARTIE'S CONTROL.

At the conclusion of the entire case and prior to summation, defense counsel made the following request to charge:

> "Mr. Laifer: There was another one. Frankly, it's my fault. I should have put it in—your Honor several times during the course of the trial indicated that it would be chargeable against the defendant the fact that they did not produce the second agent, and undercover FBI agent in that you indicated that the defendants were put at a disadvantage by that.
>
> I would request that your Honor charge as to a witness in control of the Government and that he would testify adversely to what the first agent testified to."

Said request was denied by the Court (A77-A78) and instead, the Court instructed the jury that:

> "Also, absence of the names of the informants and one of the FBI agents might make it more difficult for them to try their case because they said they wanted to cross examine these people, but I reminded you of that already." 376

In *Graves v. United States,* 150 US 118, 121 (1893), this Court held that:

> "The rule even in criminal cases is that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption (inference) that the testimony, if produced, would be unfavorable." Also See *U.S. v. Di Re,* 332 US 581 593 (1948)

Although case law of the Second Circuit as affirmed by this Court, clearly holds that the jury need not draw the inference if it does not wish to (*U.S. v. Comulada,* 340 F2d 449, 452, 2d Cir., cert. denied, 380 U.S. 978, 1965), surely enlight of the facts and circumstances of this case, including but not limited to the acquittal of all appellants of the conspiracy charge and the allegations of perjury with respect to Agent Brana's testimony, the jury may well have found that the government's failure to disclose and produce the undercover FBI Agent was because he would give unfavorable testimony and not because of the alleged potential disclosure of the informant.

The Court, in charging as it did, usurp the jury's role and precluded the jury from considering a factor which unquestionably played a significant role in the jury's determination of guilt or innocence.

Moreover, research has revealed that this Court has not set forth any definitive ruling regarding the propriety of said charge and the circumstances that require its submission to the jury. See *Burgess v. United States,* 440 F2d 226 (DC, Cir. 1970) interpreting this Court's decision in Graves. By reason of the above, certiorari should be granted to give uniformity to the various circuits.

CONCLUSION

FOR THE FOREGOING REASONS, THIS PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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Counsel for Petitioners

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of October, one thousand nine hundred and seventy eight.

Present:

HON. WILFRED FEINBERG
HON. WILLIAM H. MULLIGAN
Circuit Judges

HON. GEORGE C. PRATT
District Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DANIEL FATICO, NICHOLAS COROZZO, LEONARD DE MARIA, KENNETH REESE, JAMES DELLARATTA, LOUIS SCIDA

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and it hereby is affirmed in accordance with the Court's oral opinion in open court.

A. DANIEL FUSARO,
Clerk

BY: ARTHUR HELLER,
Deputy Clerk

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The court of appeals affirmed without written opinion (Pet. App. 1a-2a).

JURISDICTION

The judgment of the court of appeals was entered on October 24, 1978. The petition for a writ of certiorari was filed on November 22, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court correctly ruled that, in the circumstances of this case, the government was not required to disclose the name of an undercover FBI agent.

2. Whether the district court erred in refusing to instruct the jury that it could draw an adverse inference from the government's failure to produce the unidentified FBI agent.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted of having conducted an illegal gambling business in violation of 18 U.S.C. 1955 and 2.[1] The court of appeals affirmed (Pet. App. 1a-2a).

The evidence at trial established that as a result of an investigation conducted by the FBI from about mid-September 1975 through December 12, 1975, it was discovered that petitioners and a number of other individuals managed and operated an illegal gambling business on the second floor of 5002 Church Avenue,

[1] Petitioner Fatico was sentenced to a three-year term of imprisonment. Petitioners Corozzo, Dellaratta, and Reese each received two-year suspended sentences and two years probation, of which six months are to be spent at a community treatment center. Petitioner Scida was sentenced to a two-year term, four months to be served in jail and the remainder on probation. Petitioner DeMaria received a three-year probationary sentence, nine months of which is to be served in a community treatment program. All six petitioners were acquitted of a related conspiracy charge (18 U.S.C. 371).

Brooklyn, New York. FBI Special Agent Paul Brana, operating in an undercover capacity, gained access to the gambling premises on six occasions during the latter part of 1975 (Tr. 34).[2] On the first three of these occasions he was introduced into the premises by another undercover FBI agent (Tr. 82-85).

On each of these six occasions, Agent Brana observed a large sophisticated gambling operation in progress. The gambling area was located behind two heavy locked doors and was guarded by a number of lookouts and doormen (Tr. 35-37). Operating under the guise of the Churchonian Social Club, the high-stakes dice game operated by petitioners and others attracted as many as 35 players per night (Tr. 39). The game was attended by gamblers from other boroughs of New York City and from New Jersey (Tr. 242, 297-298). The amount gambled on the average roll of the dice was two to four thousand dollars, and Brana observed as much as $15,000 gambled on a single roll (Tr. 47). Based upon these and other figures, an FBI agent who was qualified as an expert witness testified that in his opinion this gambling operation was a large and substantial one (Tr. 253-254).

The dice game, which was conducted on a specially marked table, was usually operated by two dealers, who paid and collected on the bets placed by the players (Tr. 45). The dealers were assisted by "stickmen," whose function was to collect the dice

[2] "Tr." refers to the trial transcript. "S.Tr." refers to the transcript of the sentencing proceedings, June 9, 1978.

after each throw and to keep the dice moving around the table from one player to the next (*ibid.*). Agent Brana observed petitioner Fatico working as a dealer on all six nights; Corozzo worked on four of those nights as a dealer, stickman and ladderman;[3] DeMaria was seen on four nights—three as a dealer and once as a stickman; Reese worked as a cashier on all six nights; Dellaratta was seen twice, once as a dealer and once as a stickman; and Scida was observed on five of those six nights working as a stickman (Tr. 49-53). Brana never observed any of the defendants participate in the game as a player or gambler (Tr. 54).

On December 11, 1975, a United States magistrate issued search warrants for the above-mentioned premises as well as for the persons of petitioners Fatico, Corozzo, DeMaria, and Reese. The search warrant affidavit of FBI Agent Nalley was based on the observations made by agents during the surveillance of the premises as well as information obtained from two confidential informants. FBI agents executed the search warrants on December 12, 1975; they were able to do so only after breaking two heavy protective doors with a battering ram (Tr. 202-204). The agents found approximately 40 people present

[3] The function of the "stickman," as mentioned, was to collect the dice after each throw and to keep the dice moving from one player to the next. The "ladderman" observed the conduct of the game from elevated platforms located at either end of the rectangular gambling table. The cashier sat at a side table with a cash box from which he cashed in gambling chips for players (Tr. 45-46).

in the gambling premises (Tr. 155). Among the gambling paraphernalia seized were quantities of gambling chips, dice, a metal cash box, a red warning light and the gambling table (Tr. 220-224). Furthermore, approximately $1,000 in cash was found on the person of petitioner Corozzo (Tr. 204), about $3,000 in cash was found on petitioner Fatico (Tr. 214), and the search of petitioner Reese produced about $8,000 (Tr. 218).

ARGUMENT

1. Special Agent Brana was introduced into the gambling operation by another undercover FBI agent who had earlier gained entry with the assistance of a confidential informant. Because of the close association between them, the government feared the revelation of the undercover agent's identity would necessarily expose the informant; it therefore objected to defense efforts at trial to compel disclosure.[4] The district court agreed that, under the circumstances here, the government was privileged to withhold the agent's identity (Tr. 70-71, 127-133, 276; S.Tr. 18-20). This ruling was correct and involves no issue meriting review by this Court.

[4] Although petitioners assert (Pet. 4) that the government initially represented that a confidential informant had introduced Agent Brana into the gambling premises, actually the ground for objection was that disclosure might endanger a confidential informant (Tr. 70-71). The factual situation was subsequently clarified (Tr. 130-131). The informant privilege encompasses a government agent acting in an undercover capacity. *United States* v. *Wright*, 468 F.2d 1184, 1187 (6th Cir.), cert. denied, 412 U.S. 938 (1972).

Roviaro v. *United States*, 353 U.S. 53, 59 (1957), recognizes a governmental privilege not to reveal the identity of active informants who give it information concerning violations of the law. At the same time, however, the Court recognized in *Roviaro* that "[w]here the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way" (*id.* at 60-61; footnote omitted). On the facts of *Roviaro*, the balance between "the public interest in protecting the flow of information against the individual's right to prepare his defense" fell on the side of disclosure. *Id.* at 62.

This, however, is not a case like *Roviaro*, where the " 'informer was the sole participant, other than the accused, in the transaction charged,' " or where his testimony " 'might have disclosed an entrapment' " or have relevance on the issue of "identity." *McCray* v. *Illinois*, 386 U.S. 300, 310-311 (1967). Petitioners merely hoped that the informant and the other FBI agent would impeach the testifying agent on a collateral point, concerning who introduced him to the illegal gambling operation in the first place. Petitioners do not claim that the undisclosed witness could have testified with respect to their acts. Petitioners had many other criminal avenues of cross-examination and rebuttal to challenge Agent Brana's credibility or other elements of the prosecution's case.

The *Roviaro* test requires that the "determination as to whether identification of an informer is necessary for a fair disposition of a defendant's case * * * [be] left to the trial court's informed discretion." *United States* v. *Van Orsdell*, 521 F.2d 1323, 1326 (2d Cir. 1975), cert. denied, 423 U.S. 1059 (1976); *United States* v. *Soles*, 482 F.2d 105, 109 (2d Cir.), cert. denied, 414 U.S. 1027 (1973). In this case, the district court's determination not to require disclosure of the FBI agent's identity was a proper exercise of that discretion based upon the facts and circumstances presented. As the court stated during the sentencing proceeding, "[i]f there was any sense of unfairness, I would stop it, but I didn't feel in the exercise of my discretion that you were really placed at any substantial disadvantage" (S.Tr. 18-19).

2. Petitioners argue (Pet. 9-10) that the district court erred in refusing to instruct the jury that it could draw an inference that the testimony of the undisclosed and uncalled FBI agent would have been unfavorable to the government. Since the trial court appropriately determined that there was good cause for not disclosing the undercover agent's identity in order to protect an informant, there was no basis for a missing-witness charge. This is not a case of an unexplained failure to produce a material witness within the government's control. There *was* an explanation for not producing the witness, an explanation the court accepted as compelling. It has been consistently ruled in cases involving informants that, because there is good cause for non-disclosure, no "adverse inference" instruction is warranted. See, *e.g.*, *Burgess* v. *United States*, 440 F.2d 226 (D.C.

Cir. 1970); *United States* v. *Peterson*, 424 F.2d 1357 (7th Cir.), cert. denied, 400 U.S. 958 (1970).

The instruction that the court did give, both during Agent Brana's testimony and in the final charge to the jury, was free of error. During the testimony and instructions, the court advised the jury that the government's assertion of privilege had placed the defense at a disadvantage (Tr. 71, 134, 376). Although petitioners now complain that such remarks compound the supposed error, they never voiced such an objection below; in fact, defense counsel expressed satisfaction with these comments (Tr. 71). Furthermore, defense counsel was allowed to comment freely during summation on the fact that the undercover agent and the informant were not called as government witnesses (Tr. 321-322).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1979

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